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(2)

No. 07-1609

FILED
2008
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In the Supreme Court of the United States

CARL GORDON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Section 1326(a) of Title 8, United States Code, makes it a federal offense for any previously removed alien "at any time [to be] found in" the United States, without the permission of the Attorney General. The question presented is whether the statute of limitations for that offense begins to run when an alien reenters the United States by presenting an authentic but invalid green card to border agents.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-20a) is reported at 513 F.3d 659. The opinion of the district court (Pet. App. 21a-32a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 16, 2008. A petition for rehearing was denied on March 24, 2008 (Pet. App. 33a). The petition for a writ of certiorari was filed on June 23, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a conditional guilty plea in the United States District Court for the Northern District of Illinois, petitioner was convicted of being found in the United States after removal, in violation of 8 U.S.C.

1326(a). He was sentenced to 96 months of imprisonment, to be followed by three years of supervised release. Pet. 35a. The court of appeals affirmed. *Id.* at 1a-20a.

1. Petitioner, a citizen of Belize, lawfully entered the United States in 1974. He later became a lawful permanent resident, and was issued a resident alien card, or "green" card. Pet. App. 1a.

In 1985, petitioner was convicted in Illinois state court of multiple charges stemming from his commission of a series of home invasion robberies targeting elderly women. In 1990, following a hearing before an immigration judge (IJ), petitioner was removed from the United States. Before petitioner was removed, the IJ informed him that he was no longer a lawful permanent resident. Petitioner also received a form explaining that he would need the Attorney General's permission to return to the United States. Pet. App. 1a-2a.

Petitioner later returned to the United States without obtaining the permission of the Attorney General. The exact date of his return is uncertain, although petitioner asserted on appeal that he returned sometime in November 1995. Pet. App. 2a; see also Pet. 3. On August 8, 2001, petitioner was convicted in Illinois state court for the home invasion and armed robbery of a 90-year-old woman. Pet. App. 2a; Gov't C.A. Br. 5. On August 10, 2001, he began serving his sentence in state custody. Pet. App. 2a.

On April 21, 2006, while he was still in state custody, petitioner was interviewed by an agent of the Bureau of Immigration and Customs Enforcement. Pet. App. 3a. During that interview, petitioner admitted that he had illegally reentered the United States. He told the agent that he had entered the United States via Mexico, at the

San Ysidro, California, port of entry, by showing the border guard his authentic but now-invalid green card, which he had kept even though federal regulations required him to surrender it upon removal. *Ibid.*; Gov't C.A. Br. 4-5; see Pet. App. 24a (citing 8 C.F.R. 246.9, 247.14).

2. On May 9, 2006, a grand jury returned a one-count indictment charging petitioner with being a previously removed alien unlawfully present and found in the United States, in violation of 8 U.S.C. 1326(a) and (b)(2). Petitioner moved to dismiss the indictment, arguing, *inter alia*, that the statute of limitations had expired. Under 18 U.S.C. 3282(a), the statute of limitations for petitioner's offense is five years. Petitioner argued that his offense was complete when he presented his invalid green card to the border guard in November 1995. At that point, he argued, the government had "constructive knowledge of his illegal presence" and therefore had only five years to charge him for that offense. Pet. App. 3a-4a.

The district court denied petitioner's motion to dismiss. Pet. App. 21-32a. The court concluded that the statute of limitations did not begin to run at the time of petitioner's reentry. *Id.* at 31a. The court reasoned that petitioner "lied to the government about his status and fortified that lie by presenting what he knew to be invalid documentation," and it found that federal agents at the border crossing would have had "no reason to doubt the validity of that documentation, nor * * * the ability to check every seemingly legitimate document presented to them by every single one of the tens of thousands of border crossers they inspect on a daily basis." *Ibid.* The court concluded that the government therefore "had neither actual nor constructive knowledge of the defen-

dant's illegal entry into the United States in 1995 when he crossed the border." *Ibid.*

3. The court of appeals affirmed. Pet. App. 1a-20a. First, noting that Section 1326 can be violated by unlawful entry, attempted entry, or being "at any time found in" the United States, the court explained that an alien violates the "found in" provision "if he enters via a surreptitious border crossing or 'enters through a recognized port by means of specious documentation that conceals the illegality of his presence.'" *Id.* at 9a (quoting *United States* v. *Acevedo*, 229 F.3d 350, 355 (2d Cir.), cert. denied, 531 U.S. 1027 (2000)). The court concluded that petitioner's reentry was surreptitious because he "entered through a recognized port by means of an authentic but invalid green card that concealed the illegality of his return to the United States." *Id.* at 10a.

Relying on its then-recent decision in *United States* v. *Are*, 498 F.3d 460 (7th Cir. 2007), the court of appeals concluded that the statute of limitations for the offense of being "found in" the United States after removal does not begin to run at least until the federal government has actual knowledge of an "illegal alien's presence, identity and status," even if the government could have discovered the alien sooner through "reasonable diligence." Pet. App. 10a-13a. The court concluded that the federal government did not gain actual knowledge of petitioner's illegal presence in the United States until his immigration interview on April 21, 2006, and that his indictment on May 9, 2006, was therefore timely. *Id.* at 13a-14a. The court also noted that the government had conceded that, had standard procedures been followed, it would have gained knowledge of petitioner's illegal presence on August 10, 2001, when he entered state custody. The court observed that, "even if [it] were to use

the constructive knowledge date of August 10, 2001, [petitioner's] indictment would still be timely." *Id.* at 14a.

Judge Ripple filed a concurring opinion. Pet. App. 19a-20a. He agreed that *Are* was controlling if it constituted "the governing precedent," but expressed "misgivings about the legitimacy of the precedent" in light of the apparent failure to follow circuit rules requiring precirculation to the full court of decisions that establish a circuit conflict. *Id.* at 19a (citing 7th Cir. R. 40(e)). Nonetheless, he concluded that even if constructive knowledge could start the running of the limitations period, the government could not be charged with constructive knowledge from the time of petitioner's border crossing. Judge Ripple reasoned that, because petitioner "presented himself at the border with an invalid, although authentic, green card," thereby "affirmatively misleading the Government," the "Government should not be charged with constructive knowledge of this surreptitious entry, even though it occurred at an official border checkpoint." *Id.* at 20a.

ARGUMENT

Petitioner contends (Pet. 9-17) that this Court should grant review to resolve a "fundamental disagreement" over whether the statute of limitations for the offense of being "found in" the United States after removal begins to run as of the time the government can be said to have constructive, if not actual, knowledge of a deportee's illegal presence in the United States. Although the courts of appeals have articulated different approaches to the question, those analytical differences have been of limited practical significance. In any event, this case is not a suitable vehicle for review of the issue because, as the courts below made clear, the result in this case

would be the same under the constructive-knowledge standard for which petitioner argues. Further review is not warranted.

1. In rejecting petitioner's challenge to the timeliness of his indictment, the court of appeals relied on its then-recent decision in *United States* v. *Are*, 498 F.3d 460 (7th Cir. 2007), which held that the statute of limitations for the offense of being "found in" the United States after removal does not begin to run until, at the earliest, the date when the federal government "acquire[s] actual knowledge of the alien's physical presence, identity, and status as a prior deportee," or, at the latest, when "the alien surrenders or is arrested." *Id.* at 467; see Pet. App. 10a-14a. In so holding, *Are* rejected the proposition, articulated by other courts of appeals, that "constructive knowledge—the date on which immigration authorities should have discovered [a] § 1326(a)(2) violation—triggers the statute of limitations." 498 F.3d at 466; see also *id.* at 466 n.2 (citing cases from other circuits). The court reasoned that, "because the 'found in' version of § 1326(a)(2) is a continuing offense" that goes on for as long as the alien remains illegally present in the United States, the government's constructive knowledge of the alien's illegal presence "is simply irrelevant." *Ibid.*; see Pet. App. 10a-12a.

Petitioner contends (Pet. 9-12) that the Seventh Circuit's decision in *Are* created a circuit split that requires this Court's intervention. Petitioner overstates the extent of the disagreement, and no developed conflict exists that would warrant this Court's review. As a preliminary matter, although petitioner characterizes *Are* as "essentially hold[ing] that nothing short of the government's decision to arrest or prosecute the offender will trigger the statute of limitations," Pet. 12, the *Are* court

did not so hold. Rather, as petitioner elsewhere acknowledges (Pet. 7), *Are* did not definitively resolve whether the statute of limitations begins to run as of the date of arrest or as of the date of "*actual* discovery" of the alien's illegal presence. See 498 F.3d at 466-467. Nor did the court of appeals in this case have occasion to resolve that question, since petitioner in this case was already in custody when the federal government discovered his illegal presence. See Pet. App. 13a.

Petitioner is correct, however, that *Are*'s rejection of a constructive-knowledge standard stands in contrast to the language of a number of other appellate decisions, issued before *Are* was decided, that have stated that the limitations period for a "found in" Section 1326 prosecution may start to run not only on the date of a defendant's actual discovery but also at any earlier time when "the knowledge of the illegality of his presence, through the exercise of diligence typical of law enforcement authorities, can reasonably be attributed to the immigration authorities." *United States* v. *Santana-Castellano*, 74 F.3d 593, 598 (5th Cir.), cert. denied, 517 U.S. 1228 (1996); see also *Are*, 498 F.3d at 466 n.2 (citing cases). The differences between the Seventh Circuit's approach and those of other courts of appeals are, however, of limited practical significance. Pet. 10. The courts of appeals that have recited the constructive-knowledge standard have not generally relied on constructive knowledge of an alien's illegal presence in calculating the applicable limitations period; rather, they have generally found that law enforcement authorities could not reasonably have discovered the alien's illegal presence in the United States before the date of *actual* discovery, and that the statute of limitations therefore did not start to run before that date. See, *e.g.*, *United States* v.

Clarke, 312 F.3d 1343, 1348 (11th Cir. 2002) (per curiam); *United States* v. *Mercedes*, 287 F.3d 47, 56 n.11 (2d Cir.), cert. denied, 537 U.S. 900 (2002); see also *United States* v. *Rivera-Ventura*, 72 F.3d 277, 282 (2d Cir. 1995) (limitations period began to run when INS agents apprehended defendant); cf. *United States* v. *Bencomo-Castillo*, 176 F.3d 1300, 1303-1305 (10th Cir. 1999) (for purposes of determining applicability of Sentencing Guidelines enhancement, defendant not "found" until date when INS identified him as a previously deported alien); *Santana-Castellano*, 74 F.3d at 598 (same).

In *United States* v. *Gomez*, 38 F.3d 1031 (1994), the Eighth Circuit assumed, without deciding, that the government had been negligent in failing to discover that a defendant who had filed an application for temporary residence had previously been removed from the United States, but held that the "*earliest possible* time" at which government officials exercising reasonable diligence could have discovered the defendant's illegal presence was within the limitations period. *Id.* at 1037-1038. Although the court stated that "the statute of limitations for a 'found in' violation should * * * begin running when immigration authorities could have, through the exercise of diligence typical of law enforcement authorities, discovered the violation," the court also noted that, "[a]s the cases attest, the result of this diligence is that the time at which the immigration authorities should discover the violation is often at or near the time the defendant is taken into custody." *Id.* at 1037.

Finally, in *United States* v. *DiSantillo*, 615 F.2d 128 (1980), the Third Circuit reviewed the Section 1326 conviction of a defendant who had entered the United States via a recognized port of entry, using an

American-issued visa. In his visa application, he incorrectly stated that he had not been previously "arrested and deported," as opposed to merely having been excluded from the United States. *Id.* at 131. More than five years after his reentry, he was interviewed by INS agents, and was ultimately indicted for violation of Section 1326. *Id.* at 130. The Third Circuit held that the indictment should have been dismissed as untimely. *Id.* at 132, 137. The court noted that the authorities had processed and approved the defendant's visa application before his entry; that the defendant had "entered the United States through a recognized immigration port of entry"; and that "immigration authorities knew of his entry and could have, through the exercise of diligence typical of law enforcement authorities, discovered his violation at that time." *Id.* at 135-136. The court concluded that, because "the crime of illegal entry through a recognized INS port of entry after being arrested and deported is not a continuing offense," an alien "may not be indicted under § 1326 more than five years after he entered or attempted to enter the United States through an official INS port of entry when the immigration authorities have a record of when he entered or attempted to enter." *Id.* at 136-137. On the other hand, the court stated, "[i]f no record is possible because the entry was surreptitious and not through an official port of entry, the alien is 'found' when his presence is first noted by the immigration authorities." *Ibid.*

The import and continued vitality of *DiSantillo* is not entirely clear. Some courts have read *DiSantillo* to concern only the limitations period for the unlawful "entry" provision of Section 1326, and not the "found in" provision. See *Gomez*, 38 F.3d at 1035; see also *United States* v. *Ortiz-Villegas*, 49 F.3d 1435, 1437 (9th Cir.), cert. de-

nied, 516 U.S. 845 (1995). To the extent that *DiSantillo* does speak to Section 1326's "found in" provision, the Third Circuit has called its holding into question, suggesting that re-examination may be called for in an appropriate case. *United States* v. *Lennon*, 372 F.3d 535, 541 n.8 (3d Cir. 2004) (noting that there is "force" to the argument that "the passage of time does not give rise to a de facto amnesty that legalizes an unlawful alien's presence"). In any event, after *DiSantillo*, the Third Circuit has reiterated the suggestion that, in the case of surreptitious entry, the limitations period does not begin to run until the alien's presence comes to the attention of immigration officials, and has further made clear that an entry may be surreptitious even though it occurs at a recognized port. *Id.* at 540-541 (holding, for Sentencing Guidelines purposes, that a deportee who reentered the United States through a recognized port of entry, but using a false name, "committed" the crime of being "found in" the United States when she was apprehended by INS agents, and not immediately upon reentry); see also *United States* v. *Hernandez-Gonzalez*, 495 F.3d 55, 60 (3d Cir.) ("[T]he logic of *DiSantillo* does not apply where the alien entered surreptitiously, by, for example, concealing his or her identity"), cert. denied, 128 S. Ct. 685 (2007); cf. *Are*, 498 F.3d at 466 n.2 (citing *DiSantillo* for the proposition that "[t]he Third Circuit has * * * adopted an 'actual discovery' rule for cases in which there is no record of when the deportee reentered"). The decision below, which concerns a surreptitious entry at a recognized port, see Pet. App. 10a, is consistent with the Third Circuit's suggestion.

2. Even if review were otherwise warranted to resolve any differences between the Seventh Circuit's approach and the approaches of other courts of appeals,

however, this case would not be a suitable vehicle. As the courts below concluded, even if the limitations period began to run as of the date the government arguably had constructive knowledge of petitioner's illegal presence in the United States, the indictment would still be timely. See Pet. App. 14a ("We point out, however, that even if we were to use the constructive knowledge date of August 10, 2001, [petitioner's] indictment would still be timely."); see also *id.* at 19a-20a (Ripple, J., concurring) (concluding that the indictment would be timely even if the court were to apply a constructive-knowledge standard); *id.* at 31a (finding that the government did not have constructive or actual knowledge of petitioner's illegal presence more than five years before petitioner was indicted).

Petitioner's argument rests on the premise that the government had constructive knowledge that he was present in the United States well before August 10, 2001, the date when he entered state custody following his conviction for home invasion and armed robbery. Specifically, petitioner contends the government had constructive knowledge of his illegal presence as soon as "he provided accurate identifying information at the San Ysidro border" sometime in November 1995. Pet. 17. That argument, however, overlooks the fact that petitioner provided his identifying information to the border guard in the form of an authentic green card that he knew to be invalid, which "concealed the illegality of his return to the United States." Pet. App. 10a; see *id.* at 28a. Although petitioner asserts that immigration authorities could have discovered petitioner's illegal status had they consulted a "computer database specifically designed to verify the status of aliens entering the United States," Pet. 17, the district court in this case

specifically found that "[t]he border crossing agents had no reason to doubt the validity of [petitioner's] documentation, nor did they, under the circumstances, have the ability to check every seemingly legitimate document presented to them by every single one of the tens of thousands of border crossers they inspect on a daily basis," Pet. App. 31a. Other courts to address similar arguments have reached similar conclusions. See, *e.g.*, *United States* v. *Acevedo*, 229 F.3d 350, 355-356 (2d Cir.) (a deportee's presentation of a green card rendered invalid by his prior removal does not charge government with constructive knowledge), cert. denied, 531 U.S. 1027 (2000); cf. *United States* v. *DeLeon*, 444 F.3d 41, 52 (1st Cir. 2006) ("there can be no finding of lack of diligence" where a deportee who used an alias during the removal proceedings later reentered the United States using an invalid green card in his own name). For that reason as well, further review is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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AUGUST 2008